

May 6, 2004

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE DONALD E. ARMSTRONG,

Debtor.

BAP No. UT-03-059

DONALD E. ARMSTRONG,

Appellant,

Bankr. No. 00-26592
Chapter 11

v.

ORDER AND JUDGMENT*

KENNETH A. RUSHTON, Trustee,

Appellee.

Appeal from the United States Bankruptcy Court
for the District of Utah

Before NUGENT, BROWN, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The Appellant requested oral argument, but after examining the briefs and appellate record, the Court has determined unanimously that oral argument will not assist materially in the determination of this appeal. Fed. R. Bankr. P. 8012. Therefore, the case is ordered submitted without oral argument.

The debtor, Donald Erwin Armstrong (Armstrong), appeals the Order of the United States Bankruptcy Court for the District of Utah approving separate settlements between the plaintiff/trustee, Kenneth Rushton (Trustee), and the law firms of Munsch Hardt Kopf Harr and Dinan, P.C. and Michael Foster (Munsch Hardt) and Capshaw

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Goss & Bowers, LLP (Capshaw Goss) entered July 29, 2003 (Settlement Order). Finding no abuse of discretion, we AFFIRM. In so holding, we DENY the Appellee's Motion to Dismiss filed September 29, 2003.

Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this timely-filed appeal. 28 U.S.C. § 158(b)-(c)(1); Fed R. Bankr. P. 8002(a). An order approving a compromise and settlement is a final, appealable order. *In re Cajun Elec. Power Co-op, Inc.*, 119 F.3d 349, 354 (5th Cir. 1997). The parties have consented to this Court's jurisdiction by not electing to have this appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8001(e).

Standard of Review

An order approving a compromise and settlement is a matter within the sound discretion of the bankruptcy court and is reviewed for an abuse of discretion. *Kopp v. All American Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997). Under the abuse of discretion standard, the appellate court will not disturb the trial court's decision unless it has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissive choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999) (abuse of discretion is "an arbitrary, capricious, whimsical or manifestly unreasonable [judgment]") (internal quotation omitted).

Background

Armstrong is a frequent litigator in this Court. In the case of *Armstrong v. Rushton (In re Armstrong)*, 294 B.R. 344 (10th Cir. BAP 2003) (BAP No. UT-02-007), the Court set forth a detailed account of the history of Armstrong's litigation and the Chapter 11 filing. Therefore, only a limited recitation of the facts is required here.

Armstrong is the settlor, beneficiary and trustee of two trusts (Trusts) created in

1983 and 1994. In the mid-1990s, the Trusts entered into a real estate transaction with Steppes Apartments, Ltd. (Steppes), in which Steppes financed a real estate purchase with two promissory notes, one to each Trust. Litigation arising out of the transaction ensued, with Steppes alleging that the notes were usurious. The law firm of Capshaw Goss initially represented the Trusts in the Steppes litigation, but withdrew prior to trial. While represented by Capshaw Goss, and on threat of contempt from the trial court, Armstrong produced a payoff calculation on the notes. Armstrong then instructed Capshaw Goss to file a motion to recuse the trial judge, which was granted.

Michael Foster of Munsch Hardt succeeded Capshaw Goss as counsel for the Trusts. Foster decided not to request a jury trial because during discovery in the Steppes litigation, Armstrong had cursed during a deposition; also, Foster believed a bench trial was more appropriate to the complex usury questions. Armstrong disagreed with Foster's decision. During the trial, Foster solicited the testimony of the Trusts' usury witness, who testified that the notes were not usurious. Despite that testimony, Steppes prevailed.

In 1997, a judgment for usury penalties was entered in Steppes's favor against the Trusts (Texas Modified Judgment). The Trusts appealed the Texas Modified Judgment through the Texas appellate system, which affirmed the judgment. On June 23, 2002, the United States Supreme Court denied the Trusts' petition for certiorari. The Texas Court of Appeals characterized the promissory notes as usurious on their face.

In 1997 and 1998, as trustee of the Trusts, Armstrong commenced legal malpractice actions against Capshaw Goss and Munsch Hardt. The allegations in the complaints related to introduction of the payoff calculations, Foster's failure to request a jury trial, the testimony of the usury expert, and other general claims. The legal malpractice actions were pending when Armstrong commenced a pro se, voluntary Chapter 11 petition on March 20, 2000. Kenneth Rushton was appointed the Chapter

11 Trustee for the estate. On January 31, 2002, over Armstrong's objection, the bankruptcy court confirmed Rushton's Second Revised Plan of Reorganization (Confirmation Order).

In the Confirmation Order, the bankruptcy court ruled that all property rights owned by the Trusts were property of the Armstrong estate, including the legal malpractice actions against Capshaw Goss and Munsch Hardt, and the right to pursue, prosecute, settle or exercise control over those lawsuits. Armstrong appealed the Confirmation Order to this Court, which dismissed the appeal as untimely on June 4, 2002. Armstrong appealed the dismissal to the Tenth Circuit Court of Appeals (Circuit Appeal). The Circuit Appeal is pending. There is no stay pending appeal of the Confirmation Order.

Pursuant to his authority in the Confirmation Order, Rushton examined the legal malpractice claims and after extensive negotiation, reached a settlement agreement with both Capshaw Goss and Munsch Hardt. Under the settlements, in return for complete releases, Capshaw Goss will pay the estate \$50,000.00 and Munsch Hardt will pay the estate \$100,000.00.

The bankruptcy court held a hearing on Armstrong's objection to the proposed settlements. Rushton, a trustee with considerable experience, testified that the estate had no funds or counsel to litigate the lawsuits. He also assessed the likelihood of success as slim because Rushton would have to prove that but for the actions of counsel, the Trusts would have prevailed in the Steppes litigation. Rushton characterized this requirement as having to try a case within a case, a costly and complex endeavor. Proving the case within a case was complicated by the holding that the notes were usurious on their face.

Rushton also testified that there were valid reasons why Foster recommended a bench trial in the Steppes litigation. For example, Armstrong's deposition conduct could prejudice a jury verdict. Further, because usury questions are complicated, a

bench trial was preferable.

Based on the evidence, the bankruptcy court approved the motions to compromise. In its Order, the bankruptcy court discussed the uncertainty of a successful result, the difficulty in proving a case within a case, counsel's advice to Armstrong concerning his conduct and its impact on a jury, the complexity of the litigation, the value of the settlements to the estate, and the litigation expense. The bankruptcy court concluded the settlements were fair and reasonable. This appeal followed.

Discussion

The issue is whether the bankruptcy court abused its broad discretion in approving the settlements. Armstrong raises numerous other issues, most of which relate to Armstrong's perception that he is unfairly treated by the courts and Rushton and his dissatisfaction with the Texas Modified Judgment. Those issues have been raised repeatedly in other appeals to this Court and are not relevant in this case. Therefore, the Court will address the pertinent issue as stated by Armstrong: whether the settlements "[m]ust be vacated for lack of basis, evidence and because they are not fair and equitable to the Estate."

A decision to approve a settlement under Fed. R. Bankr. P. 9014 must be "an informed one based upon an objective evaluation of developed facts." *In re Kopexa Realty Venture Co.*, 213 B.R. at 1022 (quoting *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989)). As articulated in the *Kopexa* case, the court considers the "probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views." *Id.* Approval should be given only if the settlement is fair and equitable. *In re Cajun Elec. Power Co-op, Inc.*, 119 F.3d at 355.

In this case, the bankruptcy court held a hearing where testimony evidence was

admitted and the legal issues were fully argued by the parties. In its Order, the bankruptcy court correctly concluded that collection of a judgment was not a factor in this case. The court analyzed the settlements under the other *Kopexa* standards.

The bankruptcy court considered the complexity of the litigation, including the necessity of proving the underlying contract case as well as the malpractice actions; the Trustee's assessment that he was unlikely to prevail on the merits, especially in light of Armstrong's conduct at the deposition and the holding of the Texas Court of Appeals that the notes were usurious on their face; the Trustee's assessment that the litigation would be costly; and the value of the settlements to the creditors. The bankruptcy court correctly determined that those factors weighed in favor of approving the settlements.

Conclusion

The bankruptcy court held a hearing, applied the correct legal standards to the evidence presented, and properly concluded that the settlements were fair and in the best interests of the estate. Finding no abuse of discretion, we AFFIRM.